



An  
Bord  
Pleanála

## Inspector's Report PL01.RL3479

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### Question

Whether the importation of inert soil for the purposes of site restoration in a quarry is or is not development and is or is not exempted development.

### Location

Powerstown, County Carlow.

### Declaration

Planning Authority

Carlow County Council

Planning Authority Reg. Ref.

SEC5/16/03.

Applicant for Declaration

Kilcarrig Quarries Ltd.

Planning Authority Decision

Carlow County Council

### Referral

Referred by

Kilcarrig Quarries Ltd.

Owner/ Occupier

Kilcarrig Quarries Ltd.

Observer(s)

None

Date of Site Inspection

20<sup>th</sup> September 2016.

Inspector

Hugh Mannion

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## **1.0 Site Location and Description**

- 1.1. The site is about 8.4ha and is located about 10kms north of Bagnalstown and 8kms south of Carlow town. The western site boundary adjoins the former N9, now the R448 and the southern boundary runs along a local road the L3045. The new M9 runs to the west of the site and the overall area is accessed from junction 6 in the motorway marked for Carlow/Bagnalstown and Leighlinbridge.
- 1.2. The referral relates to the site of the extraction and processing of sand and gravel granted under PL01.129838. There is a further element of quarrying currently under way to the east of the site and permitted under planning authority register reference number 13/187.

## **2.0 The Question**

- 2.1. The question before the Board is the whether the importation of inert soil for the purposes of site restoration in the quarry is or is not development and is or is not exempted development.

## **3.0 Planning Authority Declaration**

### **3.1. Declaration**

The planning authority decided that the importation of inert soil is development and is not exempted development.

The restoration works using imported inert soil in relation to authorised quarry lands is development and is not exempted development.

### **3.2. Planning Authority Reports**

### **3.3. Planning Reports**

- 3.4. The planner's report stated that the subject of the referral was the importation of soil as restoration works for a disused quarry. The area to be filled is 6.26ha to a depth of 0.9m and over five years giving rise to a total of 90,000 tonnes of soil being

imported. The importation of soil at this location is likely to give rise to significant environmental effects and the proposed works therefore require planning permission.

### 3.5. Other Technical Reports

There are no other technical reports on file.

## 4.0 Planning History – this site.

**PL01.129838** (01/300) Permission granted for development comprising extraction and processing of sand and gravel on the site the subject of this referral at Powerstown, County Carlow.

**PL01.240137** Permission (on part of the site covered by PL01.129838) was refused for the retention of the 0.26ha of extracted quarry, previously approved entrance, wheel wash, haul route and settlement ponds. Permission also sought to extend sand and gravel extraction in a 1.25ha area along with the relocation and erection and operation of previously authorised plant on a total site area of 2.41ha at Powerstown, County Carlow for two reasons;

1. Having regard to the planning history of the site, the documentation submitted with the planning application and appeal including the response to the S.132 Notice, the Board is not satisfied that the extent of development to be retained is adequately described in the plans and particulars submitted (including in terms of the deviations from the permitted areal extent and depth of excavations authorised under An Bord Pleanála Reference No. PL01.129838). In these circumstances, it is considered that the Board is precluded from consideration of the application the subject of the appeal for retention of this development.

2. Having regard to deviations from the development permitted under An Bord Pleanála Reference No. PL01.129838, and in particular the conflicting details between the respective planning applications regarding the depth of groundwater, the Board is not satisfied on the basis of the documentation submitted in the subject application that the proposed development would not

pose an unacceptable risk of environmental pollution and be prejudicial to public health. There is insufficient information before the Board to draw conclusions as to the potential environmental impacts or on potential impacts on the River Barrow SAC. It is therefore considered that to permit development would be contrary to the proper planning and sustainable development of the area.

## **5.0 Planning History – nearby sites.**

PL01.225469 Permission was refused for retention of extension to an existing sand drying plant, south of the present site, at Powerstown, County Carlow.

PL01.225913 Permission was granted for erection of a maintenance workshop at Powerstown, County Carlow.

PL01.238351 Permission was granted for retention of weighbridge and weighbridge office, readymix plant, blockmaking yard, pre-stressed concrete floor production plant and associated concrete making plant, washing plant and lagoons, extension to sand drying and mixing plant, screening plant, mobile crushers, canteen and toilet block and fuel storage shed and permission for a new entrance and wheelwash all at Powerstown, Milford, County Carlow.

PL01.241819 Permission granted for retention of a washing plant and associated lagoons, grading plant and mobile crushers; to vary the duration of permission from 20 years to indefinitely; and to vary commencement time of operation to one hour earlier at the site for aggregate based manufacturing facilities all at Powerstown, County Carlow.

This site was also subject to QV.01.0261 for an AA and EIA determination.

## **6.0 Policy Context**

### **6.1. Development Plan**

The Carlow County Development Plan 2015 to 2021 is the current county development plan for the area.

## 6.2. Natural Heritage Designations

The site is close to the River Barrow and River Nore SAC (002162).

## 7.0 The Referral

### 7.1. Referrer's Case

The referrer's case may be summarised as follows.

- This referral relates to the lands the subject of PL01.129838. The works permitted under that application have been completed and the applicant now wishes to carry out restoration works which can only be carried out by the importation of soil/subsoil.
- Condition 2 of PL01.129838 granted a lifetime of 5 years to the permitted quarrying. Condition 3 required a site restoration and landscaping scheme. Condition 7 required the removal of plant and equipment within 6 months of cessation of operations. Condition 11 provided that no filling materials would be imported into the site without the written agreement of the planning authority. Notwithstanding that some of the periods mentioned in these conditions have expired it is still open to the planning authority to agree the details of materials which could be imported into the site. Works such as re-instatement of land where actual excavation has ceased remains exempted development.
- The reinstatement of the site through the importation of fill material does not contravene a condition of any planning permission and therefore is exempted development.
- The proposed fill material comprises topsoil, clay and stones and is not waste material and the activity therefore accords with condition 11 of the original permission under PL01.129838. The total quantity of fill material required is about 90,000 tonnes with an average of about 18,000 tonnes per year over 5 years. This is below the threshold for EIA provided for in the EIA regulations.
- The previous plan provided for an average 0.4/0.5m depth of fill over the site; the currently proposed depth is 0.9m.

- An AA screening is submitted which concludes that the proposed site restoration scheme would have no significant adverse impacts on a Natura 2000 site.

## 7.2. Planning Authority Response

The planning authority made a submission and made the following points.

- The restoration of this site has been the subject of lengthy correspondence with the quarry owner and action by the planning authority under the unauthorised development provisions of the act. A phasing plan for the restoration of the site required under PL01.129838 was agreed between the quarry owner and the planning authority. In addition to the original phasing agreement further agreements provided for completion of restoration works by the 31<sup>st</sup> August 2014.
- It was further agreed that the materials from the opening of the adjoining quarry under reference number 13/187 could be used for fill in the area covered by PL01.129838. The planning authority carried out a site inspection on the 4<sup>th</sup> April 2016 and concluded that haul route through the site and a remaining small area of the site remains to be reinstated.
- The importation of significant amounts of material into the site does not constitute exempted development. The importation of a total of about 90,000 tonnes of fill or about 20,000 per year would require EIA and is therefore, not exempted development having regard to Section 4 of the Act.

## 7.3. Further Responses

There are no further responses.

## 8.0 Statutory Provisions

### 8.1. Planning and Development Act, 2000

S.2(1) Defines, among other things, “**works**” – as including any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...

S.2(1) Defines, among other things, “use” – in relation to land, does not include the use of the land by the carrying out of any works thereon;

S.3(1) In this Act, “development” means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.

S.3(2) For the purposes of *subsection (1)* and without prejudice to the generality of that subsection-

S.3(2) (a) where any structure or other land or any tree or other object on land becomes used for the exhibition of advertisements, or

S.3(2) (b) where land becomes used for any of the following purposes-

(i) the placing or keeping of any vans, tents, or other objects whether or not moveable and whether or not collapsible, for the purpose of caravanning or camping or habitation or for the sale of goods,

(ii) the storage of caravans or tents, or

(iii) the deposit of vehicles whether or not usable for the purpose for which they were constructed or last used, old metal, mining or industrial waste, builder’s waste, rubbish or debris, the use of the land shall be taken as having materially changed.

## 8.2. **Planning and Development Regulations, 2001**

8.3. Article 9 of the Planning and Development Regulations 2011, as amended, provides for exceptions to the classes of exempted development provided for in Article 6. Article 9(1)(c) provides that development is not exempted development if it is development to which Part 10 applies, unless the development is required by or under any statutory provision (other than the Act or these Regulations) to comply with procedures for the purpose of giving effect to the Council Directive. Part 10 refers to the requirement to carry out EIA.



## 9.0 **Assessment**

### 9.1. **Is or is not development**

9.2. The referral refers to the importation of an average of 18,000 tonnes of material over 5 years into a site of about 6.3ha. S.2(1) of the Act provides that **works** include “any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...”. I conclude that the importation of large quantities of soil into the site comprises an alteration to the site and is therefore, works.

9.3. In accordance with section 3(1) of the Act works become development when they are carried out on, in, over or under land. I conclude therefore that the works the subject of this referral comprise development. It is furthermore noteworthy that in accordance with section 3(2)(b)(iii) the deposit of mining waste or industrial waste, builders’ waste, rubbish or debris on land comprises development.

### 9.4. **Is or is not exempted development**

9.5. Section 4 of the Act sets out certain forms of development which shall be exempted development, certain agriculture related works, certain tree plant in activities and other developments. The referrer makes no case that the bringing of fill to the site comprises an activity included in section 4.

9.6. Article 6(1) of the Regulations provides that, subject to Article 9 classes of development specified in Column 1 of Part 1 of Schedule 2 shall be exempted development provided they comply with the conditions set out in Column 1 of Part 1 of Schedule 2. Having reviewed these classes of development I conclude that the works referred to in this referral do not fall within any of these classes. It may be noted that the referrer does not make a case that any of these classes of development apply.

9.7. The referrer makes the case that the works are in compliance with a permission granted under PL01.129838 on the 4<sup>th</sup> April 2003. He makes the case that while

condition 2 of that grant of permission restricted the period of use of the sand and gravel pit to 5 years that condition 3 allowed for a restoration and landscaping scheme be submitted to the planning authority by the quarry developer and to be agreed the planning authority. The planning authority agreed to a restoration programme in three phases; December 2012, August 2012 and February 2013. Having regard to my site inspection, the reports on the planning authority file and the drawings submitted by the referrer especially drawing number PP-008 'Site Restoration Sections A-A B-B & C-C' it appears to me that remaining un-restored element of the site is the haul road and an area along the eastern boundary of the site with the area covered by application 13/187. Although the issue is somewhat unclear it appears that the area stretching west from the haul road has been subject to fill and levelling.

- 9.8. Although the EIS for PL01.129838 is no longer available the Board's appeal file is. The Board responded to an enquiry from the EPA in December 2014 and stated that the "the site was to be restored to agricultural use following cessation of quarrying. Stripped and mounded topsoil and subsoil were to be used in the restoration. The application as accompanied by an Environmental Impact Statement (EIS). The information in relation to restoration of the site made no reference to import of soils or subsoils – referring to grading of overburdens and unsaleable material over the extractions area, followed by the placement and spreading of the soils".
- 9.9. It is solely within the competence of the planning authority to determine if planning conditions have been complied with and such compliance is not a matter for the Board. It is the planning authority's conclusion is that the conditions of permissions PL01.129838 have not been complied with. It may also be observed that that permission has expired without such an agreement.
- 9.10. **Restrictions on exempted development**
- 9.11. Article 9 of the Regulations provides restrictions on exempted development. These include, but are not limited to, contravention of a condition attached to a grant of permission, giving rise to traffic hazard, interference with landscapes designated for

protection in a development plan, excavation, alteration or demolition of places, caves, sites, features or other objects of archaeological, geological, historical, scientific or ecological interest, the preservation, conservation or protection of which is an objective of a development plan, fencing or enclosure of lands habitually open to the public for 10 years, obstruction of rights of way. Of particular interest is article 9(c) which removes the exemption from development to which Part 10 of the Act applies. Part 10 refers to Environmental Impact Assessment.

9.12. The planning authority screened the works the subject of this referral for EIA and concluded that the works would give rise to likely significant impacts on the environment and that it would therefore not be exempted development in accordance with Article 9(c) of the Regulations.

9.13. The planning authority determined that the imported soil constitutes waste. Therefore the importation of soil comprises an activity within a class provided for in article 11(b) of the Regulations which provides that installations for the disposal of waste with an annual intake greater than 25,000 tonnes not included in Part 1 of Schedule 2 (broadly these are purpose built installations for the incineration and/or chemical treatment of landfill, hazardous and non-hazardous wastes) be subject to EIA and that although not reaching the threshold within that class (that is, an annual intake of 25,000 tonnes) that having regard to the criteria set out in the 7th schedule to the Regulations that the proposed activity requires an EIS. The applicant makes the point in his referral submission to the Board that the activity (18,000 tonnes/per annum average) is well below the threshold for requiring EIA and therefore the proposal should not lose its exemption on this ground. The Board has previously decided that the importation of material including soil, subsoil, rock and undefined aggregate is waste (20.RL.3209). In my view it is the responsibility of the referrer in this case to demonstrate that the soil/subsoil is (a) not waste within the meaning of section 4 of the Waste Management Act, 1996, as amended, or (b) that the material which has been or is proposed to be imported into the site does not exceed the threshold set out in the regulations for requiring EIA. A separate question arises in relation to any retrospective assessment of works which may require EIA but it is not necessary to consider that question in this case.

9.14. Having considered the EIA screening assessment carried out by the planning authority, the submission by the landowner, my site inspection, and the advice set out in the Environmental Impact Assessment – Guidance for Consent Authorities regard Sub-Threshold Development (DOEHLG 2003) I conclude that the referrer has not demonstrated that the importation of soil and subsoil would not be likely to have significant effects on the environment. In these circumstances and having regard to section 4(4) of the Planning and Development Act 2001, as amended, I conclude that the proposed development is not exempted development.

9.15. **Appropriate Assessment.**

9.16. The site is within the catchment of the River Barrow and River Nore SAC (002162). The NPWS has published conservation objectives for the SAC. These are the maintenance of habitats and species within the Natura 2000 site at favourable conservation condition which will contribute to the overall maintenance of favourable conservation status of those habitats and species at a national level.

9.17. The qualifying interests in the SAC are:

- Desmoulin's whorlshell (Vertigo moulinsiana)
- Freshwater pearl mussel (Margaritifera margaritifera)
- White-clawed crayfish (Austropotamobius pallipes)
- Sea lamprey (Petromyzon marinus)
- Brook lamprey (Lampetra planeri)
- River lamprey (Lampetra fluviatilis)
- Twait shad (Alosa fallax)
- Atlantic salmon (Salmo salar)
- Estuaries
- Mudflats and sandflats not covered by seawater at low tide.
- *Salicornia* and other annuals colonising mud and sand.
- Atlantic salt meadows.
- Otter (Lutra lutra)

- Mediterranean salt meadows
- Killarney fern (*Trichomanes speciosum*)
- Nore freshwater pearl mussel (*Margaritifera durrovensis*)
- Watercourses of plain to montane levels with *Ranunculion fluitantis* and *Callitriche-Batrachion* vegetation
- European dry heaths.
- Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels.
- Petrifying springs with tufa formation (*Cratoneurion*)
- Old sessile oak woods with *Ilex* and *Blechnum* in the British Isles
- Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion*, *Alnion incanae*, *Salicion albae*)

9.18. The landowner submitted an AA screening report which made the points that there are no water courses on site linking the site to the SAC, that the material to be imported is inert, non-polluting and is not harmful to human health. The screening exercise therefore concluded that the restoration scheme/importation of soil/subsoil alone or in combination other projects will have no significant adverse impacts on the qualifying interests of the Natura 2000 site.

9.19. The site is located 110m from the boundary of the SAC and the referrer has applied the source /pathway/receptor model in the screening exercise. However, the screening exercise relies exclusively on the absence of surface water connection with the SAC to rule out potential impacts. There is almost certainly a ground water connection between the site and the SAC which was not explored by the screening report. The screening report also concluded that there are no in-combination effects arising from the proposed importation of fill into the site with other plans or projects. There is an another quarry (subject of QV.01.261 – subject of judicial review) being operated by the referrer to the south the subject site, a quarry operated by the referee immediately to the east (planning reference 13/187) and a local authority landfill adjoining that quarry further to the east.

9.20. I conclude therefore on the basis of the information provided with the referral and in the absence of a Natura Impact Statement the Board cannot be satisfied that the proposed development individually, or in combination with other plans or projects would not be likely to have a significant effect on the River Barrow and River Nore SAC (002162) or any other European site, in view of the site's Conservation Objectives. In these circumstances and having regard to section 4(4) of the planning and development Act 2001, as amended I conclude that the proposed development is not exempted development.

## 10.0 Recommendation

10.1. I recommend that the Board should decide this referral in accordance with the following draft order.

**WHEREAS** a question has arisen as to whether the importation of soil and/or subsoil into a former quarry site at Powerstown, County Carlow is or is not development or is or is not exempted development:

**AND WHEREAS** Tom McDonald of Kilcarrig Quarries, Kilcarrig Heights, Bagenalstown, County Carlow requested a declaration on this question from Carlow Council and the Council issued a declaration on the 31<sup>st</sup> day of August, 2015 stating that the matter was development and was not exempted development:

**AND WHEREAS** Tom McDonald of Kilcarrig Quarries, Kilcarrig Heights, Bagenalstown, County Carlow referred this declaration for review to An Bord Pleanála on the 9<sup>th</sup> day of May, 2016:

**AND WHEREAS** An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,

- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(1)(a) and Section 4(4) of the Planning and Development Act, 2000, as amended,
- (d) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (f) the planning history of the site,

**AND WHEREAS** An Bord Pleanála has concluded that:

- (a) The works the subject of this referral are development within the meaning of Section 2 of the Planning and Development Act 2000, as amended.
- (b) The permission granted under PL01.129838 has expired and the conditions of that permission were not complied with to the satisfaction of the planning authority.
- (c) The works the subject of this referral comprise works within Class 11 (b) of Part 2 of Schedule 5 of the Planning and Development Regulations 2001, as amended. Therefore, the works are subject to screening in accordance with Schedule 7 of the Planning and Development Regulations 2001, as amended, and are not exempted development in accordance with Section 4(4) of the Planning and Development Act 2000, as amended.
- (d) The works are not directly connected with or necessary to the management of a European site in accordance with article 6(3) of the Habitats Directive. It has not been established, to the satisfaction of the Board, that there is not a hydrological relationship between the site and the River Barrow and River Nore SAC (002162) which would require appropriate assessment. Therefore, the works are not exempted development in accordance with Section 4(4) of the

Planning and Development Act 2000, as amended.

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the 2000 Act, hereby decides that the importation of soil/subsoil into the site at Powerstown, County Carlow is development and is not exempted development.

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Hugh Mannion  
Senior Planning Inspector

22<sup>nd</sup> June 2017